

Hon. O. H. Browning.  
Speech  
on Confiscation.

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ON CONFISCATION.

SPEECH

OF

HON. O. H. BROWNING, OF ILLINOIS,

DELIVERED

IN THE SENATE OF THE UNITED STATES,

WEDNESDAY, JUNE 25, 1862.

The Senate, as in Committee of the Whole, having resumed the consideration of the bill (H. R. No. 471) to confiscate the property of rebels for the payment of the expenses of the present rebellion, and for other purposes—

Mr. BROWNING said:

Mr. PRESIDENT: We are in the midst of a war for the support of the Constitution. If there had been no departure from its principles, no violation of its provisions, there would have been no war. If all the citizens of the United States would return to their allegiance to the Constitution, and submit to its requirements, the war would at once cease. It could not be prolonged an hour. We are in arms against the rebels because they are in arms against the Constitution. They are struggling to overthrow it; we, to maintain and uphold it. This is the theory of the war. The practice should conform to the theory. If it does not we are fighting in vain. We should keep the re-establishment of the authority of the Constitution and the Government over all the States of the Union steadily before us as the great central object of our efforts. We cannot succeed unless we, ourselves, keep within the limits of the Constitution, and respect and submit to its authority. When we put aside its provisions, break over its restraints, and go outside of its limits, we become co-workers with rebels and traitors in their work of destruction. If, in the progress of the war, the Constitution falls, whether by the act of the rebels or by our act, or by the joint action of both, I repeat that the people will have fought and bled in vain, and have expended their treasure in vain. The Senator from Massachusetts [Mr. SUMNER] in his discussion of the bill under consideration, has given expression to such novel and extraordinary views, and has announced, as undeniable law, principles of such dangerous tendency, and which, if carried into legislation, will be so fatally mischievous in their consequences, that I cannot permit them to go to the country, and into the permanent records of its history, without my earnest protest against them, in however feeble terms that protest may be made.

The Senator has truly stated the ends we have in view, "national unity under the Constitution of the United States." These ends cannot be attained by the measures he proposes. If it be conceded that they would secure "national unity," they would fail of the other end, to secure it "under the Constitution of the United States," for they would themselves overthrow that Constitution. The Senator struggles with difficulties which could not beset him if his *only* object was "national unity under the Constitution of the United States." This object can be easily reached if we forbear infringing any provision of the Constitution, or going outside of it.

But there is another object which cannot be reached without going "outside of the Constitution," and assuming and exercising powers not granted by it; and I presume that I do the Senator no injustice in supposing him to be more earnestly in pursuit of this object than any other. If not, whence the necessity of quitting the Constitution and exploring the history of the world, from the time "when Ahab took the vineyard of Naboth, and David gave away the goods of one of the confederates of Absalom;" through all the barbarisms of intervening ages, for sources from which Congress is to draw its power to do the act which he proposes? Why refer us to the confiscation bills of Colonial Legislatures, passed during the struggle with the mother country? They were restrained by no such provisions as are contained in our Constitution, but gave unbridled license to their exasperated and revengeful passions. The wrong and injustice of these colonial acts of confiscation, and experience of the evils that grew out of them, unquestionably led to the adoption of the clause of the Constitution prohibiting a like power to Congress. So far from the long array of colonial acts, with which the Senate has been presented, being authority to justify Congress in similar legislation, they are, on the contrary, authority directly against it. While these acts were yet upon the statute-books, and their effects present and palpable all over the country,



the very men who were actors in the exciting events out of which they grew, fearing that a time might come when the Congress of the nation, blinded by passion, might venture to follow the bad and dangerous precedents of the Colonial Legislatures, took the most effective measures to guard against it by inserting positive prohibitions in the Constitution of the Union.

Still less support is derived from the practice of the English Government. What the British Parliament may have done heretofore affords no safe analogy for the interpretation of the Constitution of the United States. The constitutions of the two countries are widely and essentially different. I institute no comparison of merit between them. The British constitution is unquestionably a magnificent work, perhaps the best that could be devised for the government of the British people. But it is not *our* Constitution. It is not a written constitution. "What Parliament declares to be the constitution of England is the constitution of England." Parliament may pass bills of attainder, outlawry, and confiscation, and execute them, and no question of power can be made, for it is omnipotent, and its will the supreme law of the land.

The constitution of England is subordinate to the will of Parliament. The Congress of the United States is subordinate to the Constitution. It is hedged in with restraints which it cannot break over or trample upon without most serious injury to the structure of the Government, and great danger of sapping its foundations.

I therefore put aside, as inapplicable to our condition, all the examples from ancient and modern history. They neither prove nor illustrate any point in this debate. If we have the power to pass the bill before us we derive that power from the Constitution, and from no other source. The practice of other nations, and of the colonies prior to the adoption of the Constitution, can give us no aid. The Constitution, and the practice of our own Government under it, and the expositions of it by the judicial tribunals, and by the great men who made it, who had studied it and understood it, and comprehended the grandeur and harmony of all its principles, should alone be consulted, alone accepted as authority.

The Senator was right when he said, "in every Government bound by a written Constitution, nothing can be done which is not in conformity with the Constitution." After this announcement we had a right to expect an argument which would uncover and "exhibit clearly" the sources of power in the Constitution itself, instead of a learned and interesting disquisition upon the history of confiscations in other countries, and a deduction of authority from that. I know he claims the power under the Constitution, and cites the provisions from which he derives it; but it is only necessary to analyze his argument, indeed only necessary to

call attention to it, to expose its infirmity and to show how far he has permitted his wishes to mislead his judgment.

After stating that "the Constitution has not been silent on this question," he recites the particular provisions which, in his opinion, contain the grant of power to Congress to do all which the bill before us proposes. He says the Constitution "has expressly provided that Congress shall have power, first, 'to declare war.'"

This is undeniably true, and the question arises spontaneously to the lips, is this a bill to declare war? If so, the Senator is right in claiming for Congress the authority to pass it. If it is not, then he gets no support from this provision of the Constitution. He might as well deduce from it the power to charter a national bank as the power to free slaves and confiscate property.

Secondly, "to grant letters of marque and reprisal."

The question again comes, is this a bill to "grant letters of marque and reprisal?" If not, why quote the clause? for, by virtue of it, and from it, Congress gets no shadow of authority to do any other act whatever.

Thirdly, "to make rules of captures on land and water."

The Senator has, no doubt inadvertently, misquoted the clause. As it stands in the Constitution it is to "make rules *concerning* captures on land and water." But the bill neither makes rules *of* captures, nor *concerning* captures, and does not relate, in the remotest degree, to captures, either on land or water, and it cannot, therefore, lean upon this clause for support, whether we give it the one reading or the other.

Fourthly, "to raise and support armies."

Fifthly, "to provide and maintain a navy."

Will any Senator have the temerity to attempt to point out in what way this bill tends to raise and support an army, or to provide and maintain a navy? Would it not be a mockery of the Senate to ask it to listen to an argument intended for such a purpose?

Sixthly, "to make rules for the government and regulation of the land and naval forces."

There is not one word in the bill that was put there with any expectation of its having the slightest effect on the government and regulation of either the land or naval forces.

Seventhly, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

There is no invasion to repel, and provision has long since been made and carried into effect for calling forth the militia to suppress the insurrection. No one has yet had the hardihood to assert that this bill is intended for any such purpose. If it is, it would be difficult to imagine one less likely to accomplish the end.

Mr. SUMNER. May I interrupt the Senator?

Mr. BROWNING. Yes, sir.

Mr. SUMNER. I understood the Senator to say that the bill under discussion, which is the House bill, was not founded on the provision of the Constitution concerning captures; that, in short, it did not in any way relate to captures. Now, I have in my hand that bill, and will read the introductory clause. It is as follows:

"That all the estate and property, money, stocks, credits, and effects of the persons hereafter named in this section are hereby forfeited to the Government of the United States, and are declared lawful subjects of seizure and of prize and capture wherever found, for the indemnity of the United States against the expenses of suppressing the present rebellion."

The bill, therefore, is derived directly, specifically, unequivocally, in just so many words, out of the positive language of the Constitution of the United States.

Mr. BROWNING. Mr. President, I am replying to the Senator's speech on the basis on which he made it. I am not willing that he shall shift his ground now. At the time he made his speech and gave utterance to the language that I have quoted, the bill from which he now reads had never made its appearance in this body.

Mr. SUMNER. Will the Senator allow me to interrupt him again?

Mr. BROWNING. Yes, sir.

Mr. SUMNER. I had already offered that bill myself. It was on the table of the Senate as my bill, to be voted on at the proper time as an amendment to the Senate bill; and I now read from my own bill, which has since been adopted in the other House.

Mr. BROWNING. The bill was not before the Senate at the time the discussion was going on. It may have been on the table.

Mr. SUMNER. The Senator will pardon me. When I rose to make my speech, this bill, in the form of an amendment or substitute, had been already offered by me. It was on the table; and notice was given that at the proper time, when it would be in order, it would be pressed to a vote; and my speech was made to support that bill. Therefore the Senator is entirely mistaken—I know he does not intend to do me injustice—when he says that I change my ground. Sir, I have no disposition to do that. I wish to meet this question frankly under the Constitution of the United States. I know the strength of the position which I occupy, and I know it is only by misunderstanding it that it can be answered.

Mr. BROWNING. Mr. President, I will endeavor not to misunderstand, and am very sure I will not willingly misrepresent the Senator. I desire to understand him distinctly. I am very sure I will not misrepresent him.

Mr. SUMNER. I know that you will not.

Mr. BROWNING. It may be true, as he

says—it matters not to me, so far as this discussion is concerned, whether it is or not—that the bill from which he now reads had been presented. Conceding it to be so, I think there is no fair-minded lawyer who will take the pains to examine the constitutional provisions, who is familiar with the law of nations, and who will compare them with this bill, who will not at once concede that the bill, if it does in terms relate to captures, does so in terms only for the purpose of evading a plain constitutional provision; that it does not come at all within the spirit or the letter or the intention of the Constitution.

These, I believe, are the only specific grants of power upon which the Senator relies; these are the only sources from which he draws to justify the bill. What conceivable measure can passion or caprice suggest, that would not find as much support in the provisions referred to as a bill to free slaves and to confiscate property? And if this is the best showing of authority that learning, talent, and ingenuity can make from the Constitution, may we not safely conclude that none whatever is to be found within its lids?

A very important part of the Senator's speech, and which appears to me to be among the most heterodox, and dangerous, and indefensible doctrines he puts forward, are ranged under the inquiry, "what are the rights against enemies which Congress may exercise in war?" To this inquiry the Constitution gives a very explicit answer. They have all already been enumerated. Congress may "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." It may "raise and support armies;" "provide and maintain a navy;" "make rules for the government and regulation of the land and naval forces;" "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." There is the answer, and there is the whole of it. These enumerations, extracted from the Constitution, declare all the powers "which Congress may exercise in war;" and these it may exercise just as well in peace as in war. Congress has no powers which are peculiar to a state of war—none which are "dormant in peace and aroused into activity only by the breath of war." Yet this I understand to be the view which the Senator takes of the Constitution, and of the powers of Congress under it. I understand him to contend that Congress may exercise powers to-day, because war exists, which it cannot assert to-morrow if peace ensues; and it is from this assumption of a shifting power that he deduces authority to Congress to pass the bill under consideration. I wish to do him no injustice, and



therefore quote his own language. He says:

"There is not one of the rights of war which Congress may not invoke. There is not a single weapon in its terrible arsenal which Congress may not grasp."

And again:

"But when claiming these powers for Congress, it must not be forgotten that there is a limitation of time with regard to their exercise. Whatever is done against the rebels in our character as belligerents under the rights of war, must be done during war, and not after its close."

That this is true when spoken of the *Government* I now admit, and always have admitted; but that it is true when spoken of *Congress* I utterly deny. "There is not one of the rights of war which" the *Government* "may not invoke." There are many which *Congress* dare not touch without becoming a usurper. And now I desire, in all kindness, and with all possible respect, to ask the gentleman whether it is his deliberate judgment, as a lawyer and a Senator, that *Congress* possesses attributes and may exercise powers in the exigency of war which it does not possess, and may not exercise, when peace and tranquility overspread the land?

Mr. SUMNER. Does the Senator wish an answer?

Mr. BROWNING. I have certainly no objection to an answer.

Mr. SUMNER. I answer most clearly that Congress has powers during war and against public enemies which it has not during peace towards any citizens of the United States. There are rights of war which belong to all nations, and the United States is not without them. Those rights may all be exercised through Congress, but they must be exercised in the time of war. As rights of war, they are limited to war. There are penal statutes, statutes against treason, statutes for the punishment of rebellion, which may be enforced at any time, both in war and in peace; but the rights of war grow out of war, and can be exercised only during war.

Mr. BROWNING. I am happy to find—

Mr. SUMNER. If the Senator will pardon me, to go back to the topic on which we were before—

Mr. BROWNING. I cannot give way for a speech to be interpolated, and I do not wish to go back from the point I am discussing.

Mr. SUMNER. I merely wish to call the Senator's attention to a point on which he differed from me. I stated that the speech I had the honor of making some time ago was made on my own bill.

Mr. BROWNING. I concede it, sir.

Mr. SUMNER. I find that the pamphlet edition, which I have in my hand, but which I had not when the Senator did me the honor to refer to it some moments ago, is entitled as fol-

lows: "Speech of Mr. Sumner, of Massachusetts, on his bill for the confiscation of property and the liberation of slaves belonging to rebels." It was from that bill that I read, a bill founded on that provision of the Constitution which confers upon Congress the power to regulate captures.

Mr. BROWNING. I am perfectly willing to concede all that. It neither changes nor modifies any single point in this discussion. I am very happy to find that I had neither misunderstood nor misrepresented the Senator in assuming that he contended that under the Constitution Congress might exercise powers to-day, because war existed, which it could not exercise to-morrow if peace ensued. If this be so, then I desire to know whether all the powers of Congress are not derived from the Constitution; whether it possesses any not granted by the Constitution; and what particular clause or provision of that instrument it is which invests it with authority to do an act to-day which it would not have been equally competent to do at any single hour of the last twenty years? Yet this proposition must be maintained to justify the action which is urged upon us. It must be shown that a state of war enlarges our powers; for the right is claimed to judge of, and decide upon, military necessities; and the Senator truly says this, if done at all, "must be done during war, and not after its close." The reasoning upon this subject proceeds thus: "it is the right of Congress to judge of, determine upon, and order to be executed, all measures demanded by military necessities; but military necessities do not arise when peace prevails, therefore Congress cannot exercise these powers in times of peace, but can when war is raging, and therefore the powers of Congress are augmented and amplified by a state of war."

The premises are false, and the all deductions made from them are likewise false. It is not true that Congress may assume and exercise all the active war powers in the actual prosecution of war. The Constitution invests it with no such prerogative. It is not true that Congress may decide upon the measures demanded by military necessities, and order them to be enforced. If it can do so in one instance, it can do so in every instance. If it can grasp and wield this power in one case, it can do so in all cases. I deny that the right exists, in any case, to pass in judgment upon what is properly called a military necessity. It may become a military necessity when an army, with its munitions and supplies, has been transported across a stream, to destroy the bridge that bore them safely over, and leave only the deep and rapid river in the rear. It may be a military necessity to preserve the bridge, that the means of safe retreat may be at hand if adverse fortune should require it. It may become a military necessity, as an army marches through the enemy's country, to waste and devastate it, and



leave only ruin and desolation behind to signalize its passage. It may become a military necessity, upon the surrender of a beleaguered city, to give it up to pillage and plunder, or to wrap it in flames and reduce it to a smouldering and blackened heap of ruin. It may become a military necessity, upon the approach of the hostile army, to destroy all the stores and munitions of war, and retreat instead of fight. It may become a military necessity to refuse quarter in battle, or to put to the sword all the prisoners who may be captured. Some of these, I admit, are extreme cases, and of rare occurrence; but they have occurred, and will occur again, and when they do they must be promptly met and acted upon.

They are all of the class properly called military necessities. And now, I again ask whether it is seriously contended that Congress has either right or power to judge of and determine upon any one of them a month in advance of its occurrence? Whatever the seeming necessity may be now, when the month has elapsed it may no longer exist. May Congress to-day order that upon the capture of a city a week hence it shall, as a military necessity, be sacked and burnt? However great the apparent necessity for such measures now, the events of an hour may so change the face of affairs that the necessity will be found in leniency, forbearance, and protection. May Congress to-day determine that the military necessities of the next battle to be fought will require that no quarter shall be given, and that all prisoners shall be put to the sword? Let us register such an edict, and on the page that chronicles man's deepest and darkest infamy we will outlive the emperor who fiddled by the light of his magnificent capital in conflagration.

These necessities can be determined only by the military commander, and to him the Constitution has intrusted the prerogative of judging of them. When the Constitution made the President "Commander-in-Chief of the army and navy of the United States," it clothed him with all the incidental powers necessary to a full, faithful, and efficient performance of the duties of that high office; and to decide what are military necessities, and to devise and execute the requisite measures to meet them, is one of these incidents. It is not a legislative, but an executive function, and Congress has nothing to do with it. Congress can "raise and support," but cannot command armies. That duty the Constitution has devolved upon the President. It has made him Commander-in-Chief, and therefore Congress cannot be. Nor can Congress control him in the command of the army, for, if it can, then he is not Commander-in-Chief, and the assertion of the Constitution to that effect is a falsehood. And whenever Congress assumes the control of the army in the field, it usurps the powers of a co-ordinate department of the Government, de-

troys the checks and balances provided for the safety of the people, and subverts the Constitution. Legislative encroachment upon the prerogatives of the other departments thus boldly once begun, where will it end? It will go on increasing in strength, and pushing its conquests, till it subordinates the Constitution itself to its will, and becomes as omnipotent as the British Parliament. It is from the legislative department of the Government that danger is to be apprehended; not the executive or judicial. They are inherently weak, and we cannot too carefully guard against encroachments upon their prerogatives by the legislative department. In discussing the distribution of the powers of Government to the three departments, and the danger to be apprehended from them, Mr. Madison, in the forty-eighth number of the *Federalist*, says:

"It is evident that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." \*

\* \* \* \* \* "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." \* \* \* "It is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions. The legislative department derives a superiority in our Government from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."

But to return again for a moment to the question whether Congress can control the President in the supreme command and direction of the army, I ask attention to the fifty-ninth number of the *Federalist*, by Mr. Hamilton. He says:

"The President is to be Commander-in-Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the *supreme command and direction of the military and naval forces*, as first general and admiral of the *Confederacy*; while that of the British king extends to the *declaring of war and to the raising and regulating of fleets and armies*, all which by the Constitution under consideration would appertain to the legislature."

Here the respective powers of the President and Congress, as connected with the Army, are most clearly and distinctly stated. Congress is to *raise and regulate* the Army; when raised

and regulated, the President is to have the *supreme command and direction*.

Again, in the seventy-fourth number, the same distinguished statesman, recurring to the same subject, said :

"The President of the United States is to be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. The propriety of this provision is so evident, and it is, at the same time, so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the Chief Magistrate with a council, have, for the most part, concentrated the military authority in him alone. Of all the cares or concerns of Government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms an usual and essential part in the definition of the executive authority."

This was all said before the adoption of the Constitution, and to commend it to the acceptance of the people. At a later day, after it had been adopted, and questions, as now, arose as to the extent of the legislative power under it, Mr. Madison, in discussing a bill before Congress, said :

"He did not accede to the principle of the bill. He did not see any such immediate prospect of a war as could induce the House to violate the Constitution. He thought that it was a wise principle in the Constitution to make one branch of the Government raise an army and another conduct it. If the Legislature had the power to conduct an army they might embody it for that end. On the other hand, if the President was empowered to raise an army, as he is to direct its motions when raised, he might wish to assemble it for the sake of the influence to be acquired by the command. The Constitution has wisely guarded against the danger on either side."—4 *Elliott's Debates*, p. 444.

Now, hear again the Senator from Massachusetts state the legal proposition from which he deduces the power to Congress to give the sanction of enactment to the measures which he proposes. Overturn his premises, and his conclusions naturally and necessarily fall with them. In stating what he claims to be a grant of power to Congress by the Constitution to control armies and conduct war, he says :

"Language could not be broader. Under its comprehensive scope there can be nothing essential to the prosecution of the war, its conduct its support, or its success; yes, sir, there can be nothing essential to its success which is not positively within the province of Congress. There is not one of the rights of war which Congress

may not invoke. There is not a single weapon in its terrible arsenal which Congress may not grasp."

The great architects of the Constitution, who had studied it profoundly, and mastered and comprehended its philosophy, and who could not be driven by popular clamor in after years to mar their majestic work, have placed and left on record, for the admonition and guidance of those who were to come after them, the solemn and authoritative declaration, that it was "a wise principle in the Constitution to make one branch of the Government raise an army and another conduct it." The fathers of the Constitution, whose long experience of the imperfections of existing systems had taught them all the necessities to be provided for by organic laws, distributed the powers of Government to different departments, and to prevent conflicts and collisions, preserve order, and secure harmony in the working of the system, they erected barriers to keep them separate, and to confine each department to its appropriate sphere, and restrain it from encroachments upon another.

The honorable Senator recognises no such barriers, no such separation of powers, but claims that all executive powers which the President may exercise in the prosecution of the war are held by him in subordination to the will of Congress, subject to its control and direction, and all of which Congress may exercise concurrently with the President if it so chooses. He puts the matter thus :

"Doubtless there are rights of war, embracing confiscation, contribution, and liberation, which may be exercised by the commanding general in the field, or may be ordered by the President, according to the exigency." \* \* \* \*  
"But all these rights of war which I have reviewed to-day are deposited with the Government of the United States, which means Congress in conjunction with the President."

I will not pause to controvert the very remarkable assertion that the President and Congress constitute the Government of the United States, but take issue at once with the Senator upon the not less extraordinary proposition that the rights of war are deposited with the Government to be exercised by Congress and the President conjointly. There is not, sir, a single power of the Government, so far as I am informed or believe, not one single power, which may be exercised either conjointly or concurrently by the different departments of Government. There are certain acts to be performed which cannot be perfected without the assent of both the executive and legislative departments, but the part to be performed by each is clearly and distinctly defined, and neither can trench upon the province of the other. They are separate and distinct acts, to be performed by each department for itself, by its separate action, and not by the conjoint action of both.



The part to be performed by the President must be performed by him alone. Congress can neither do nor control the doing of it. If the act is legislative, it must be done by Congress; if executive, by the President, and the President alone.

Mr. SUMNER. May I interrupt the Senator there?

Mr. BROWNING. Yes, sir.

Mr. SUMNER. I should not interrupt him if I did not hope to bring his attention to the precise point. The Senator says that if the act be legislative, it must be by Congress alone; if executive, by the President alone. I would ask the Senator whether every legislative act must not receive the signature of the President? Receiving the signature of the President, does not every legislative act become the conjoint work of the Congress and of the President? That is what I had in view when I said that these rights of war were to be exercised by Congress in conjunction with the President; for nothing done by Congress can receive final effect until it has the signature of the President.

Mr. BROWNING. Mr. President, the language of the Senator upon which I am commenting was, "there is not one of the rights of war which Congress may not exercise; there is not a weapon in its terrible arsenal that Congress may not grasp." Nothing is said about the President.

Mr. SUMNER. And the Senator quoted the words of mine, "in conjunction with the President." An act of Congress becomes a law only through the signature of the President.

Mr. BROWNING. I am as fully aware of that as the Senator can be. As I stated already, there are certain acts which cannot be perfected without the action of both Congress and the President. I stated that, and stated it distinctly; but, sir, do they act conjointly or concurrently? Neither. Congress has its part to perform, and the President has his part to perform; and Congress can no more control him in giving or withholding his approval to a bill, than he can control Congress in giving or withholding its approval. The acts are separate and distinct, to be performed by each department for itself, wholly irrespective of the wishes and wholly emancipated from any restraint by the other.

I say, sir, if the act is legislative, it must be done by Congress; if executive, by the President, and the President alone. Congress cannot act with him either conjointly or concurrently. He is as supreme in his sphere as the legislative department is in its sphere; and in the performance of the duties with which the Constitution has charged him he cannot, without an abnegation of his authority, submit to be controlled by either Congress or the people, they being as completely subject to the Constitution and as much bound to yield to its authority as he is. It is admitted by the Senator

that "there are rights of war, embracing confiscation, contribution, and liberation, which may be exercised by any commanding general in the field, or may be ordered by the President according to the exigency." This, sir, is an admission fatal to the claim of power he makes for Congress to exercise the same "rights of war, embracing confiscation, liberation, and contribution;" for to show that the President may exercise them is to demonstrate that Congress cannot. I repeat what I have before said, that there is no single power granted by the Constitution to be exercised indifferently by the President and Congress. The jurisdiction is exclusive in each. If the one possesses it, the other cannot. If this were not so, there would be continual and dangerous collisions between these two departments of Government. One might choose to exercise the power in one way, and the other precisely in the opposite way, and this would result in such fatal antagonisms as would not only retard but absolutely suspend the wheels of Government.

The exercise of the law-making power by the President would be rank usurpation. It is as flagrant usurpation, and far more dangerous to the integrity of the Constitution and the Government, for Congress to assume executive power.

Another error into which zeal for confiscation in this particular mode, and by congressional action, has hurried the Senator, is to be found in the assertion that "it is clear" "that there is no limitation to the amount of fine which may be imposed for crime, so that in its sweeping extent it may practically take from the criminal all his estate, real and personal." Before dogmatizing on the Constitution, it might be well to read it. I quote the eighth article of the amendments:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Yet, in the teeth of this, the Senator asserts that "it is clear that there is no limitation to the amount of fine which may be imposed for crime." With this claim of omnipotence for Congress, it ought not to surprise us to hear gentlemen contend that for the very common and not very atrocious offence of assault and battery the whole of a man's estate, real and personal, may be swept from him by confiscation, and his family pauperized, if Congress so wills it, and that all constitutional barriers to a like punishment for treason may be easily surmounted by a resort to the unlimited and illimitable power of imposing fines. What matters it that the Constitution interposes to stay the hand from giving up the estate to absolute forfeiture for treason? We have sworn to support the Constitution, and are troubled with some "compunctious visitings of conscience" when the precise thing which the Con-



stitution, in terms, forbids is proposed; but how easy to calm the moral perturbation by a sneer at constitutional scruples, and reach the same end by the shorter and directer road of a fine whose "insatiable maw" shall incontinently swallow all at a gulp.

Mr. Justice Story, in his Commentaries on the Constitution, says of this clause:

"The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the national Government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts. In those times, a demand of excessive bail was often made against persons who were odious to the court and its favorites, and on failing to procure it they were committed to prison. Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted. Upon this subject Mr. Justice Blackstone has wisely remarked, that sanguinary laws are a bad symptom of the distemper of any State, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the Decemviri, were full of cruel punishments; the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the Republic flourished. Under the emperors severe laws were revived, and then the empire fell."

It was to prevent a repetition of these oppressions, these atrocities, which, in times of high party excitement and exasperation, had often been perpetrated, and which the convention, judging more correctly than the commentator, feared might be resorted to again, that this provision was inserted. Long experience had already taught the civilized world that undue severity of punishment, instead of preventing and diminishing crime, tended to provoke and increase it. The progress of Christianity had developed a wish to mitigate, as far as compatible with the imperfection of human institutions, the rigor of criminal laws which involved the innocent in the punishments due to the guilty; and this provision, as well as that against forfeitures, and the passage of bills of attainder, was inserted with a view to the accomplishment of that object.

To a greater or a less extent, the wife must suffer for the guilt of the husband, and the child for that of the parent; but this should be so only to the extent which is inevitable in God's economy of the world, and human laws should be confined within that limit. It was the purpose of the framers of the Constitution to protect the innocent families of offenders from utter impoverishment and ruin for crime which they had not committed, and could not prevent.

It was the intention to leave to such families the means of subsistence and livelihood, after the law had exhausted its power of punishment on the criminal; but this object has not been attained, if the unlimited power of imposing fines exists, as contended for by the honorable Senator from Massachusetts. If the existence of the power can be demonstrated, there is a manifest disposition, in some quarters, to use it to the full extent suggested by him, "so that in its sweeping extent it may practically take from the criminal all his estate, real and personal."

The emergency has come which the Constitution contemplated. The stupendous, unparalleled, and unprovoked crime of the traitors in arms against the Government has justly exasperated us, and inspired a desire to strip them mercilessly, and with inexorable hand, of all their earthly possessions. Many of them deserve no mercy; and when the necessities of the war demand it, they may be stripped, but not by Congress. Congress can neither judge of and determine military necessities in the field, nor execute military powers. Nor is this what is suggested by this part of the Senator's speech, but to provide by law for sweeping away everything by civil proceedings in the courts. When this is attempted, we must look to the Constitution for the extent of our powers; and when limitations are found, respect and obey them. All limitations in this respect upon the military power are subject to modifications by the exigencies and necessities of the war, to be judged of by the war-executing power; but no such modifications supervene to amplify the authority of Congress. The traitors deserve the severest punishments, and we are anxious to strip them of their estates by absolute forfeiture; but, upon looking into the Constitution, we find our hands are tied; the power to do this is denied us. We are exasperated and restive under the restraint, and seek for some other avenue through which we may reach the same end. We resort to fines which shall be so large as to absorb everything, and practically accomplish the same result which would be attained by forfeitures and confiscations; but the Constitution has hedged against us here by providing that excessive fines shall not be imposed.

Now, in these circumstances, what is the duty of Congress? Clearly, I think, to obey the Constitution, and keep within its limitations, and neither trample upon nor evade them. These restraints were imposed because the experience of centuries had shown that power was always struggling for expansion, for the enlargement of its area of action; and that this was especially true in times of domestic disturbance and strong popular excitement; and it was foreseen that, upon such occasions arising here, it might be deemed a political necessity, by Congress, for the punishment of great offenders, who had committed stupendous crimes, to

pass bills of attainder, to confiscate estates forever, or to impose excessive fines, which would practically accomplish the same thing as absolute confiscation. The convention believed the power a dangerous one, capable of great abuses, and sure to be, at such times, so abused as ten times over to counterbalance all possible good that could be attained by its exercise—capable of being used as the instrument of crippling the other departments of the Government, and finally of usurping all their functions; and therefore, in the most emphatic terms, denied the possession of any such powers at all. Congress can exercise no powers not *granted* by the Constitution; but, with respect to those above enumerated, and some others, the convention was not content with simply withholding the grant, but put an express negation upon them all; thus tying the hands of the legislative department of the Government as tightly as it was possible to do by a written Constitution.

And, as has been most clearly and forcibly stated by the able, distinguished, and venerable Senator from Vermont, [Mr. COLLAMER,] the prohibitions were inserted because it was foreseen that occasions would arise when Congress would think it necessary to exercise the forbidden powers; when the strongest temptation to their exercise would exist; when popular clamor might demand their exercise; and when the danger of their possession would be enhanced just in proportion to the intensity of popular feeling and resentments. These restrictions were not provided for periods of tranquillity, when all the departments of Government would be moving smoothly and safely in their legitimate spheres, without temptation to reach for and grasp powers which did not belong to them, but for times of turbulence and danger, when inflamed passion would override reason, and resentment dethrone discretion and justice. It is no answer and no argument to say that it appears to us to be both necessary and just to confiscate, absolutely, the property of traitors, or to impose fines which, "in their sweeping extent, shall practically take all their property, real and personal," in punishment of their great crime. It was for this very reason, that it might seem to us necessary and just, and because the great and wise patriots, sages, and statesmen of the Revolution, who had had practical experience of the effects of such measures through all the stormy years of struggle for independence through which they had just passed, had been taught by that experience that they were neither *necessary nor just*, that the power to adopt them, when we might want to adopt them, was withheld from us. It would have been foolish to forbid a power to Congress which Congress would never want to assert; and it was precisely for the reason that it was believed the time would come when the Congress would want to do the prohibited things that the power to do them was denied.

Now, to assert that this rebellion cannot be suppressed without a resort to measures which we have no power under the Constitution to adopt, is to concede the success of the rebellion, to admit that the Constitution is overthrown, and the Government a failure. It is to admit that the aspirations of our fathers were but the dreams of enthusiasts, and that the institutions they founded, though flourishing for a time while the skies were clear and calm, have been prostrated in ruin by the first storm of faction that broke upon them. This I am not willing to concede. The legitimate and acknowledged powers of the Government, under the Constitution, are fully adequate to all the necessities of self-defence, protection, and perpetuation, if we will only give them fair play—only confine each department to its own orbit, let it work with its own instrumentalities, and prevent collisions which shall disturb and unsettle the delicately adjusted balance. To save the Government we must save the Constitution. When the Constitution is given up and we have to resort to means outside of it, the Government is given up with it. There is an end of it. Some sort of political organization may still exist, some sort of political machinery may take its place; but it will no longer be the Government of our fathers. Its whole essence and structure will be changed. No landmarks, no guides, no guarantees will be left, and no citizen will know his rights or duties, except as they are declared from day to day by the capricious, unsteady, unregulated, and irresponsible will of Congress.

Now, Mr. President, when we shall deliberately have carried into a law the assertion that there is no limitation, except the will of Congress, "to the amount of fine which may be imposed for crime," we have gone far, very far, in the work of demolition. We have thrust one supporting stone from the arch. Segregation will have begun, and all the separate parts of the structure must soon fall asunder. And how easily, how naturally, how necessarily this system of reasoning, when once adopted, leads its votary on, step by step, to the denial or perversion of all that has been regarded as settled by the jurisprudence of the past, and drives him into a legal labyrinth, from which his only guide is the thread of the *in rem*! All proceedings *in rem* for the condemnation of captures have heretofore rested upon the guilt of the *thing* proceeded against. I am not aware of an exception. The honorable Senator admits that this is so, and then, to maintain a show of consistency, proceeds in an effort to prove that all the property of a traitor participates in his guilt, and is all, therefore, liable to be proceeded against *in rem*, and absolutely confiscated, wholly irrespective of proceedings *in personam* against the guilty owner.

Mr. President, I certainly intend to treat the distinguished Senator from Massachusetts and



his opinions with the greatest possible respect, and trust that I am guilty of no discourtesy when I ask whether anything can be more fallacious or more dangerous than his reasoning upon this subject. He says:

"Through his property the traitor is enabled to devote himself to treason, and to follow its accursed trade, waging war against his country, so that his property may be considered guilty also."

This one brief sentence sweeps away the ancient basis of proceedings *in rem*, and lays a new foundation upon entirely new principles. It is no longer a question of the actual participation of the property in guilt, but the guilt of the property in all cases is to be inferred from the guilt of the owner, however innocent and impassive the property may be, and however far separated from its owner and the theatre of his crime. I beseech of the Senator to pause and review his doctrines, and earnestly to contemplate the dangerous issues to which they lead. Is it any more true of the traitor than it is of the thief, the burglar, or the murderer, that his property enables him to devote himself to crime, "and follow its accursed trade?" The man without property may shoulder his musket and levy war against his country. The man of wealth may do the same thing, but his wealth enables him to engage others in the same work. The man without property may devote himself to the work of robbery or assassination. So may the man of wealth, but he has the means of suborning others as confederates in wickedness and crime. There is absolutely and positively no difference in the effect produced by treason upon the property of the offender and the effect produced by any other crime; and if treason subjects all the property of the offender to be proceeded against *in rem* for the punishment of the owner, without any reference to the uses to which the property has been applied, the same effect must be produced, and the same consequences ensue, to all the property of every other public offender, whatever his crime may be. Neither the Constitution nor law recognises any distinction in this regard between treason and other crimes. If, then, we accept the law as stated by the Senator from Massachusetts, a total revolution is wrought in our criminal jurisprudence, and, in despite of all the safeguards of the Constitution, proceedings *in personam* for the punishment of crime may be totally ignored, and punishment inflicted by proceeding against property alone; or, what is yet worse, by punishing the same act twice, by separate proceedings, either simultaneously or at different times, against both person and property.

Confiscation of property for the crime of the owner cannot be effected by proceedings *in rem*, but can follow only upon the personal conviction of the offender, in punishment of his crime. The law upon this subject is stated

with so much force and perspicuity by Judge Sprague, in his opinion recently delivered in the case of the *Amy Warwick*, that I venture to ask the attention of the Senate to a consideration of his views. He says:

"Another objection to those decisions of the district courts is founded upon the apprehension that they may lead to or countenance cruel and impolitic confiscations of private property found on land. This apprehension is unfounded. No such consequence can legitimately follow. Those decisions undoubtedly assert that the United States have the rights of belligerents. But the extent of those rights on land, or the manner in which they were to be exercised, was not discussed. They were not even adverted to, except to say that enemy's property found by a belligerent on land, within his own country, on the breaking out of a war, will not be condemned by the courts, although it would be if found at sea. This distinction, so far as it goes, tends to show that the doctrine of maritime captures is not to be applied to seizures on land. But the danger upon which this objection is founded does not arise from the administration of the prize laws by the courts, or the exercise of belligerent rights by military commanders upon military exigencies. The objection really arises from fear of the legislation of Congress. It is apprehended that they may pass sweeping or general acts of confiscation, to take practical effect only after the rebellion shall have been suppressed; that whole estates, real and personal, which have not been seized during the war, may be taken and confiscated upon coming within the reach of the Government, after hostilities shall have ceased. This, as we have seen, would not be the exercise of belligerent rights, the war being at an end. Belligerent confiscations take effect only upon property of which possession is taken during the war. As against property which continues under the control of the enemy they are wholly inoperative. If possession be acquired by or after the peace, then previous legislation may take effect, but it will be by the right of sovereignty, not as an act of war. Under despotic governments the power of municipal confiscation may be unlimited, but under our Government the right of sovereignty over any portion of a State is given and limited by the Constitution, and will be the same after the war as it was before. When the United States take possession of any rebel district they acquire no new title, but merely vindicate that which previously existed, and are to do only what is necessary for that purpose. Confiscations of property, not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt."

Without multiplying authorities, I may safely say that this is undeniably the law. I do not understand the Senator to deny that it is the law. Indeed, he distinctly admits that "the



reason for proceedings *in rem* is," "that the *thing* is in a certain sense an offender, or at least has co-operated with the offender, as in the case of a ship in the slave trade." Admitting the law and the restraints of the Constitution, for they cannot be denied, he simply advises that we shall disregard them both.

He spurns everything which stands in the way of his wishes, and boldly and defiantly asserts that the Constitution gives to the citizens of this country no guarantees which Congress is bound to respect. This is his language :

"Glorious as it is that the citizen is surrounded by the safeguards of the Constitution, yet this rule is suspended by war, which brings into being other rights, which know no master."

Among the other safeguards with which the Constitution has surrounded the citizen, are the following :

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

According to the Senator these are all suspended; and to-day Congress may pass laws establishing a national religion, prohibiting the free exercise of religion, abridging the freedom of speech and of the press, and punishing the people for peaceably assembling to petition for redress of grievances. If all these safeguards are superseded, why not? What is to hinder if the disposition to do so shall chance to exist? I cannot hear such doctrines deliberately announced upon the floor of the American Senate without the most serious alarm, and being forced to ask myself, where are we drifting?

Mr. SUMNER. Does the Senator attribute any such doctrines to me? They exist only in his own imagination, not in anything I have ever conceived, certainly not in anything I have ever uttered. I have simply said that the rights of war are without any limitations in the Constitution. The rights of the citizen are always under the safeguard of the Constitution; and now that we are engaged in war we have no more power as regards the citizen to establish a national religion or to suspend any of those other safeguards, than we have in time of peace. I never conceived any such idea, nor has anything ever fallen from me which could have given rise to such an idea.

Mr. BROWNING. Mr. President, I read again, in the hearing of the Senate and the Senator, his own language :

"Glorious as it is that the citizen is surrounded by the safeguards of the Constitution, yet this rule is suspended by war, which brings into being other rights, which know no master."

Mr. SUMNER. That is, the rights of war. I speak only of the rights of war; I do not

allude to anything else under the Constitution. The rights of war, I say, know no master.

Mr. BROWNING. "Glorious as it is that the citizen is surrounded by the safeguards of the Constitution, yet this rule is suspended."

And what are these other rights brought into being "which know no master?" And with whom are they deposited, and by whom are they to be exercised? Not the people, for if this new doctrine be true, all the safeguards which the Constitution provided for them are superseded. It is Congress which is to "know no master." It is Congress which is to pursue its objects outside of the Constitution, and to dominate over everything and everybody, with no guarantees for anything or anybody, except its own moderation and forbearance.

May I not conclude that the Senator himself is convinced that the measures he proposes and the bill he advocates cannot be passed under and in harmony with the Constitution? If he believed that he could accomplish his ends without departing from the Constitution or infringing its provisions, would he ever have ventured to take shelter under the dangerous, radical, and revolutionary doctrine that the safeguards with which the Constitution has surrounded the people are superseded; that other rights, which know no master, are brought into being; and that Congress may pursue its objects outside of the Constitution?

It was not without surprise that I heard the Senator announce the double character of the rebels as a discovery which relieved the subject of all difficulty and embarrassment, and placed the powers which he claims for Congress beyond further question. Who has discussed this question without looking at them in the double aspect of criminals and enemies? He says :

"Regarding the rebels as criminals, you may pursue and punish them."

This nobody doubts or controverts. But, regarding them as *criminals*, how are you to "pursue and punish them?" With sword and musket and bayonet? With measures of "confiscation, contribution, and liberation?" No, sir; but in conformity with the modes prescribed by the Constitution and laws. By indictment, arrest, and trial before a jury of the country; and, when convicted, by inflicting the punishment previously ascertained and denounced by the law. When this is done, the power of punishment of the offender as a criminal is exhausted. As *criminals* you cannot confiscate their property, nor pursue them with bills of attainder and outlawry. And this is all the answer I desire to give to this suggestion. The gentleman proceeds :

"Regarding them as enemies, you may blast them with that summary vengeance which is among the dread agencies of war."

Here I will have no controversy with the Senator. I accept the proposition as sound

and true, and in exact harmony with the Constitution and international law. It is precisely what those of us who oppose this bill have contended for from the beginning; and if we will adopt and act upon this principle we will not hesitate to cease the controversy here, and let all these confiscation bills go. For the present we must regard the rebels as enemies, and pursue them with "the dread agencies of war." To enable us to do so, and do it most efficiently, no such legislation is demanded.

"The dread agencies of war" already exist. It is only necessary to grasp and wield them; and that is an executive and not a legislative function. I cannot give my assent to the dangerous doctrine, now, I believe, for the first time distinctly put forward, that Congress has co-ordinate powers with the President in the execution of the laws of war.

It will be observed that the question now made is not as to whether the property of rebels shall be subjected to confiscation, nor to what extent confiscation shall take place, if resorted to at all, but one of far greater magnitude, namely, who shall conduct the active operations of war, and determine upon and enforce military necessities? If the doctrines contended for be true, the President is stripped of his most valuable prerogatives; he ceases to be a check upon legislative power; ceases, in fact, to be a co-ordinate department of the Government. He will no longer be supreme under the Constitution in his constitutional sphere, but will be reduced to pitiable dependence upon the will of Congress, possessing and exercising only such powers as Congress chooses to concede, and at such time and in such manner as Congress may think proper to prescribe. When this is done the revolution will be complete. The Government will no longer be the Government which was evolved from the convulsions of 1776, and transmitted to us by our fathers, and we will have but little left worth struggling for. In comparison with the triumph of this doctrine, the success of the rebellion would be insignificant in radical, startling, and permanent damage to republican institutions.

The Senator has carefully avoided any discussion, or even expression of opinion, upon the question of the relation which the rebels sustain to us during the continuance of the war. We must recognise them in some distinctive character, and deal with them accordingly, conceding to them all the rights which pertain to that character. The Senator felt the embarrassment of this, and struggled with it, I think ineffectually, throughout his speech.—If the character of public enemies is conceded, then, while the war lasts, we must pursue them with "the dread agencies of war," and with them alone; and I have endeavored to show, and think I have shown, that the right to use these is deposited in other hands than those of Congress. If the character of enemies is denied, and that

of criminals alone accorded, then we cannot pursue them with the "dread agencies of war." We can use no more force against them than is necessary to arrest them and bring them to trial according to the provisions and requirements of the Constitution and laws.

The Senator says:

"Standing, as we do, face to face with enemies who are striking at the life of the Republic, it is painful to find ourselves subjected to all the 'embarrassments of a criminal proceeding, as if 'this war was an indictment, and the army and navy of the United States, now mustered on 'land and sea, was only a *posse comitatus*.'"

This, sir, is precisely the character to which the arguments and measures of the Senator would degrade the army and navy. It is, indeed, the exact proposition he makes. In a subsequent part of his speech he says:

"Or, regarding them both as criminals and 'enemies, you may marshal against them all the 'double penalties of rebellion and of war, or, 'better still, the penalties of rebellion and the 'triumphs of war.'"

Now, if they are to be dealt with as *criminals*, our only "triumphs of war" must be the triumphs of arrest by the *posse comitatus*, that the offender may be handed over to the judicial tribunals, there to be pursued, according to law, with the penalties of the law.

This cannot be done. It would be a violation of all the laws of civilized warfare. We cannot capture them as *enemies in war*, and proceed at once to punish them as *criminals under the municipal laws*. Would the gentleman himself consent that his theory should be reduced to practice? Will he advise that all those who have been captured on the field of battle, as prisoners of war, shall now, while the war yet rages, be indicted, convicted, and executed as traitors? Does he not know that this is utterly impracticable? Does he not know that one such execution by us would be the signal for retaliation by them upon our own soldiers, who, by the chances and casualties of war, are now prisoners in their hands? And when they had dared to drag one of our brave and patriotic soldiers to the gallows, and hang him up as a felon, could we retrace our steps? Could we tamely submit to the outrage? Would we dare submit? Submission would annihilate our army, ruin our cause, and bring upon us the deserved contempt of the world. We would be forced by every consideration of self-respect and self-preservation, to resent the act by retaliation. The inevitable and shocking result would be the brutal and merciless butchery of all prisoners on both sides, and to intensify the war, and imbue it with a cruelty, vindictiveness, and ferocity surpassing the murderous and bloody warfare of savages, and to make reunion and fraternity among our unhappy people an impossibility in all time to come.



When the war is ended, and the rebellion suppressed, we may then resume dominion over the rebels as citizens, and indict, try, and punish them for their treason to any extent which may be deemed wise and necessary. But then we must abandon the agencies of war. We cannot pursue and capture them as *enemies*, and at the same time try and execute them as *criminals*. We cannot marshal against them at the same time the "double penalties" of war and the criminal code. It is neither lawful nor expedient to do so, and the attempt only embarrasses and bewilders.

The Senator says :

" Dwelling on these things, I feel humbled ' that the course of the debate has imposed upon ' me any such necessity."

The necessity referred to is that declared on the threshold of his speech, of opening " the question in such a way as to *exhibit clearly all the points in issue.*"

It must be a happy state of mind which enables one to abase himself for the short-comings of his neighbors, and thank God that he is not as other men. He who has attained to such a state of perfection as to justify him in doing so, must be approaching his apotheosis, and rapidly verging to the point when he shall be withdrawn from contaminating contact with the world.

The Senator is *humbled* by the course of debate pursued by his brother Senators in this Chamber, and deploras the necessity imposed upon him of exhibiting " clearly all the points in issue." He speaks *ex cathedra*; and when he has spoken, there is an end of it. The debate is closed. He has " exhibited *clearly all the points in issue.*" There is nothing further to be said. Who can have the presumption, the audacity, to doubt as to the course to be pursued, or continue the discussion, after his oracular enunciation of the law. Listen and be enlightened. He says :

" In point of law " \* \* \* " we ' may treat the people engaged against us as criminals, or as enemies, or, if we please, as both."

But shall we treat them as criminals or as enemies? That is the question, and the question which remains unanswered by the Senator.

" If we treat them as criminals, then we are ' under the restraints of the Constitution."

Who has contended for more? Who has asserted more? This is one of the very propositions the advocacy of which by others has so *humbled* him.

" If we treat them as enemies, then we have ' all the latitude sanctioned by the rights of war."

Of this who has made any question? Who that has taken part in this discussion has not only affirmed it, but earnestly urged the vigorous employment of all the most terrible agencies of war to vanquish our enemies and crush

the rebellion? Who has *humbled* him by a denial of this right?

" If we treat them as both, [enemies and criminals,] then we combine our penalties from the ' double sources."

Here I take issue with the Senator, and deny, in the most emphatic terms, that we may, at the same time, treat them both as enemies and criminals, and " combine our penalties from the double sources."

I have already remarked briefly on this point, and will not now dwell upon it longer. This is the main feature of his theory, and to enable him to attain the object he has most at heart it is necessary that he shall maintain it. His effort to do so was able and ingenious. He will pardon me for saying in my opinion it was far from successful. When we treat the rebels as criminals, he admits that we are " under the restraints of the Constitution." If we treat them as enemies, then we pursue them with " the dread agencies of war;" but these must be wielded by the Army, and not by Congress. If we elect to treat them as the one or the other, in neither event can the power be claimed for Congress to do the act and reach the end at which the Senator is aiming; and it is to escape this difficulty, and open a new source of power for Congress, that he has taxed his talents and his learning, and been driven, in despite of them both, to the extraordinary proposition to treat them at the same time both as enemies and criminals, and from this makes the illogical deduction that, as in the one character they cannot be pursued with war, and in the other cannot be pursued in the courts, that therefore Congress displaces both the Executive and the judiciary, and acquires absolute and unlimited control over them in both characters, and may proceed to do any and everything which we may suppose to be necessary, whether meeting the sanction of the Constitution or not.

The effort to maintain this proposition has involved the Senator's argument in inextricable confusion. Let me group together a few passages culled from different parts of his speech. These are his words :

" In every Government bound by a written ' constitution nothing can be done which is not ' in conformity with the constitution."

" The rebels have gone outside of the Consti- ' tution to make war upon their country. It is for ' us to pursue them as enemies outside of the ' Constitution, where they have wickedly placed ' themselves, and where the Constitution con- ' curs in placing them also."

We, sir, are bound by a " written Constitu- ' tion," and it is admitted that nothing can be done by us " not in conformity with the Consti- ' tution," and yet we are told by the same authority it is our duty to " pursue the rebels outside of the Constitution." Can it be necessary to repeat what has not been denied, and



what I apprehend will not be denied, that Congress possesses no power, and can exercise no power, not granted by the Constitution? This being true, Congress can pursue no object outside of the Constitution without disregarding the Constitution, and usurping power which it does not possess. The Senator has a work for Congress to perform which it cannot do within the Constitution; hence his anxiety to prove its right to go outside of it. Even the army cannot pursue an enemy outside of the Constitution; that is, it can do nothing in such pursuit which is in violation of the Constitution. Our "Government is bound by a written Constitution, and nothing can be done which is not in conformity with the Constitution" by any department of the Government. No one of them, executive, legislative, or judicial, can go outside of it to grasp powers not granted by it. Nor is it necessary that they should. Every power necessary to defence, protection, and preservation is in the Government under the Constitution. All the powers of war are in the Government under the Constitution. All belligerent rights are ours under the Constitution, including every prerogative of capture, "confiscation, requisition, or liberation known in war;" all of which may be asserted by this Government under the Constitution. Every law of nations, with its privileges, protections, and restraints, is ours, under the Constitution; and it is not true that any emergency has arisen, or can arise, imposing a necessity to pursue any object outside of the Constitution. This is the completest and grandest, and best adjusted scheme of government that was ever devised by the wisdom and patriotism of man. Let us hold it fast to the sure foundations on which its great builders placed it. So long as the different departments of Government are held to their proper orbits, there is no power which can by possibility become necessary for the suppression of the rebellion, the condign punishment of treason, and the re-establishment of the authority of the Government wherever it has been displaced, that may not be asserted by the Government within the Constitution. It is only where one department invades the prerogatives of another that it becomes necessary for it to go outside of the Constitution.

The Senator wishes to accomplish an object which is now fully within the constitutional power of the Executive. Am I wrong in supposing that he distrusts the Executive, and fears the power will not be pushed to the extremity which he desires? Hence, he claims the power for Congress. But Congress cannot assume and exercise it within the Constitution, therefore he is driven to claim the right for Congress to go outside of the Constitution to reach this particular end.

I again bring together paragraphs from different parts of his speech that their strong an-

tagonisms may be seen at a glance, that it may be perceived at once how utterly irreconcilable they are. He puts the question of slavery thus:

"Congress has no power under the Constitution over slavery in the States. \* \* \* \*

But there is another power without which, I fear, the end will escape us. It is that of confiscation and liberation, and this power is just as constitutional as the other two." \* \* \* \*

"In declaring the slaves free, you will at once do more than in any other way, whether to conquer, to pacify, to punish, or to bless." \* \*

"By the old rights of war, still prevalent in Africa, freemen were made slaves; but by the rights of war which I ask you to declare, *slaves will be made freemen.*"

Is it unjust to the Senator to suppose that, as he approaches this discussion, slavery casts its dark shadow before him, and obscures the light in which he would otherwise read and interpret the powers of Congress? Is it unjust to conclude that he hates slavery more than he loves the Constitution, and that to reach and throttle the one he is willing to march over the prostrate form of the other? Am I mistaken in concluding that he has reached that state of mind which leads him to prefer that slavery and the Constitution shall die together rather than that both shall live?

Sir, my repugnance to this "relic of barbarism" is not less than that of the honorable Senator from Massachusetts. I do not hate slavery less. It would be ungracious to say that I love the Constitution more; but I will say that my veneration for the one transcends my hostility to the other; and that opposed, as every sentiment and instinct of my nature is, to the institution of slavery, and willing as I am to wound it, I yet confess myself afraid to strike it through the Constitution, or to pursue it outside of the Constitution, to wound it there. Why, Mr. President, this impatience to fly from the "ills we have to those we know not of?"

In the legitimate and constitutional prosecution of the war the fetters are falling from the slaves of the South faster than we can provide homes, the means of subsistence, and the means of intellectual and moral culture for the helpless, destitute, and, in many cases, degraded freed men and their families. Already they are beginning to press heavily upon the white population of some localities, and heavily upon the bounty of the Government. Who, sir, will dare to estimate the consequences, moral, political, social, and economical, of precipitating, in one day, as the Senator proposes, four millions of this population upon the white communities of these States? Who can contemplate them without a shudder? Who has the reckless hardihood to venture upon such a solution of this stupendous and oppressive problem of human slavery?

Before adopting the proposition of the Senator, one of two things should be resolved upon.

We must either overcome all the repugnances of nature ; raze out from our hearts all the sentiments of delicacy and propriety which we have supposed instinctive ; roll back the strong current of thought, and feeling, and habit, and education, and admit the negroes to a full, free, and unqualified social equality, or we must separate them from among us, and place them where their country, constitution, laws, customs, society, shall all be their own, and where there shall be a perfect and unrestricted community of legal, political, and social rights.

The first of these can never be done. Heaven has decreed against it ; and as easily would the leopard change his spots, or the Ethiopian his skin, as we the firm, strong instincts of our nature. The second, then, is the only alternative ; and I look with hope to the coming of the day when the bright vision of universal emancipation shall be realized ; when freedom shall rule the spacious world from clime to clime ; when civilization and the arts shall penetrate every desert, ride upon every wave, and culture every shore ; and when the bond shall go free, and build up for themselves a republic bright and glorious as our own, and press onward with us, side by side, in noble emulation for the universal diffusion of human culture and happiness. But the accomplishment of this requires time and wise caution. It cannot be done in a day. We must make haste slowly. The attempt to do it in a day will prove fatal to it forever. It would be one of those rash and extreme measures which would inevitably defeat its own ends. The power of slavery on this continent is already broken. Its sceptre has departed ; its dominion is overthrown ; it can never regain its lost political, social, and economical importance. It has reached the point where "the public mind rests in the belief that it is in process of final extinction." The question of expansion is conclusively settled against it, and henceforward it will be a

"Scorpion girt with fire,  
In circle narrowing as it glows."

Let us be patient, and let us be just, and the storm that now beats upon us will soon have spent its force ; the clouds which now so gloomily overhang us will soon be scattered, and calm and sunshine again overspread and bless the entire land. Let us stand by the Constitution and fulfil its pledge to "guaranty to every State in this Union a republican form of government, and to protect each of them against invasion," "and domestic violence." Let us not be seduced "outside of the Constitution" by any temptation, however strong, and thus admit before the nations that it has failed in the purpose of its creation, and that we can no longer govern in accordance with its provisions and requirements. The Senator's proposition is not to defend, maintain, and uphold the Government we have ; but to rend its pillars asunder,

and reconstruct another from its ruins. In what does this differ from the effort of our revolted and rebellious people but in the means proposed for its accomplishment ?

Admitting that in a "government bound by a written Constitution nothing can be done which is not in conformity with the Constitution," the Senator insists that we shall go outside of the Constitution to make his wishes accomplished facts.

Admitting that "no person shall be deprived of life, liberty, or property, without due process of law," which means without presentment or other judicial proceeding, he yet urges upon us, by a simple act of legislation, to sweep millions of property from those over whom, as citizens, we claim and exercise jurisdiction.

Admitting that "no attainer of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," he yet asserts that "there is nothing in the Constitution to forbid an absolute forfeiture" for treason, and urges that Congress shall at once proceed to confiscate all the property, both real and personal, of certain classes of citizens of the United States, and that forever.

Admitting that "the reason for proceedings *in rem* is" "that the *thing* is, in a certain sense, an offender, or at least has co-operated with the offender, as in the case of a ship in the slave trade," he yet maintains that proceedings *in rem* may be instituted against all the property of rebels, wherever found, simply because it is their property, without any reference whatever to the uses to which the property has been applied.

Admitting that persons captured in battle "may be detained as prisoners till the close of the war, unless previously released by exchange or clemency," he yet contends that all prisoners taken by our armies may instantly be handed over to the civil authorities, to be pursued and punished as criminals.

Admitting that "Congress has no power under the Constitution over slavery in the States," he yet labors to prove the possession of the power by Congress, and presses upon us to use it, of declaring free all the slaves in all the States of the Union.

Mr. SUMNER. I must correct the Senator. My speech was with regard to the rebel States, not in regard to all the States of the Union. I made no allusion to any State that was not in rebellion.

Mr. BROWNING. Admitting that "Congress has no power under the Constitution over slavery in the States," the Senator yet labors to prove the possession of the power by Congress, and presses upon us to use it, of declaring free all the slaves in all the rebel States of this Union, as he now says.

Mr. SUMNER. The Senator will do me the justice to say that I place it on the rights of war.

Mr. BROWNING. I do not care to hear



another speech at present. I care not on what power he places it. I deny and I defy, though I do not like to use that word, any man to point to one single word or letter in the Constitution which confers upon Congress any power to do any act in the exigency of war which it cannot do in times of peace. There, sir, is where the heresy lies. I give the Senator's own words, and while I desire to treat him with every possible respect, and have yielded to him repeatedly—a thing the Senator rarely does for the accommodation of anybody—I feel it incumbent upon me, as an American citizen, to say nothing of my position as a Senator, to enter my most earnest protest against this dangerous and revolutionary heresy that the powers of Congress are enlarged and amplified by a state of war. It overthrows the Government and accomplishes here in this Chamber what the rebels have not accomplished, and never can accomplish.

Such, sir, are the extremities to which the Senator is driven, the inconsistencies in which he is involved, by his effort to compass an object which, in my humble judgment, is not only unconstitutional, but which, if successful, will be fatal to the integrity of the Government itself, and change its entire character. Is it uncharitable to say that another object seems to lie much nearer the gentleman's heart than the crushing out of the rebellion and the re-establishment of the authority of the Government in all the States?

I avow my object to be, with all the terrible enginery of war, to crush down and trample out, at once and forever, this wicked and diabolical rebellion; then to pursue and blast its leaders and fomentors with the severest punishments that can be visited upon this most malignant and unpardonable treason, and to win back the hearts of the deluded masses to the good old Government which protected them through all the past, and which they cannot, even now, remember without a tear of gratitude and a sigh of regret, and from the shelter of which they were cruelly enticed away to be exposed to the pelting of the pitiless storm of treason and rebellion which has wasted their fortunes, desolated their homes, murdered their families, embittered their lives, and darkened all their future. I wish to win them back; and, as the strongest possible inducement to return, I wish them to be fully assured that when they come they will find the same beneficent Government to which they had proved faithless, as magnanimous in mercy, as bounteous in blessing, as equal in justice, as strong in protection, as when they betrayed it. Through weal and

through woe, in the sunshine of peace and amid the storm and tempest of war, I wish to stand by the Constitution. I desire that every battle fought and every victory won shall be fought and won under the Constitution and for the Constitution, and that every life that is poured out in this terrible strife shall be a libation to its great principles. Let us stand by the Constitution. We shall need its protection hereafter more than we ever have heretofore. We shall need its restraints in the times to come more than we ever have in the times that are past. When, hereafter, this Chamber shall be filled with Senators, fresh from the battle-field, whose laurels are yet green upon their brows, accustomed to command, and impatient of restraint, let there be no act of ours to be drawn into bad precedent in breaking down the bulwarks which the Constitution has erected for the security of the people. Let us leave no record behind to be pointed at as authority for encroachment upon the powers and prerogatives of a co-ordinate department. Power is always grasping, always struggling for the enlargement of its dominion. If we begin by denuding the Executive, how long will it be before the judiciary is stripped of its ermine, and all power concentrated in the hands of an irresponsible Legislature? When that is done, the history of the Republic is closed, and the history of anarchy and despotism begins its melancholy record of tyranny, and oppression, and confusion, and blood.

The beneficence of the Government in peace has been proven; its strength in foreign war has been fully vindicated. Its power to breast internal storms and commotions, and resist and subdue intestine foes, is now, for the first time, subjected to the terrible ordeal of experiment. If we rise to this great occasion, grapple successfully with the momentous events that are upon us, save the life of the nation, reunite it, and reassert its authority, and come from the conflict bringing the Constitution unharmed with us, perfect in its strength, and in the harmony and majesty of its proportions, the page that bears the record of the achievement will be gilded with a brighter glory, will glow with a purer ray, than any in the annals of our race.

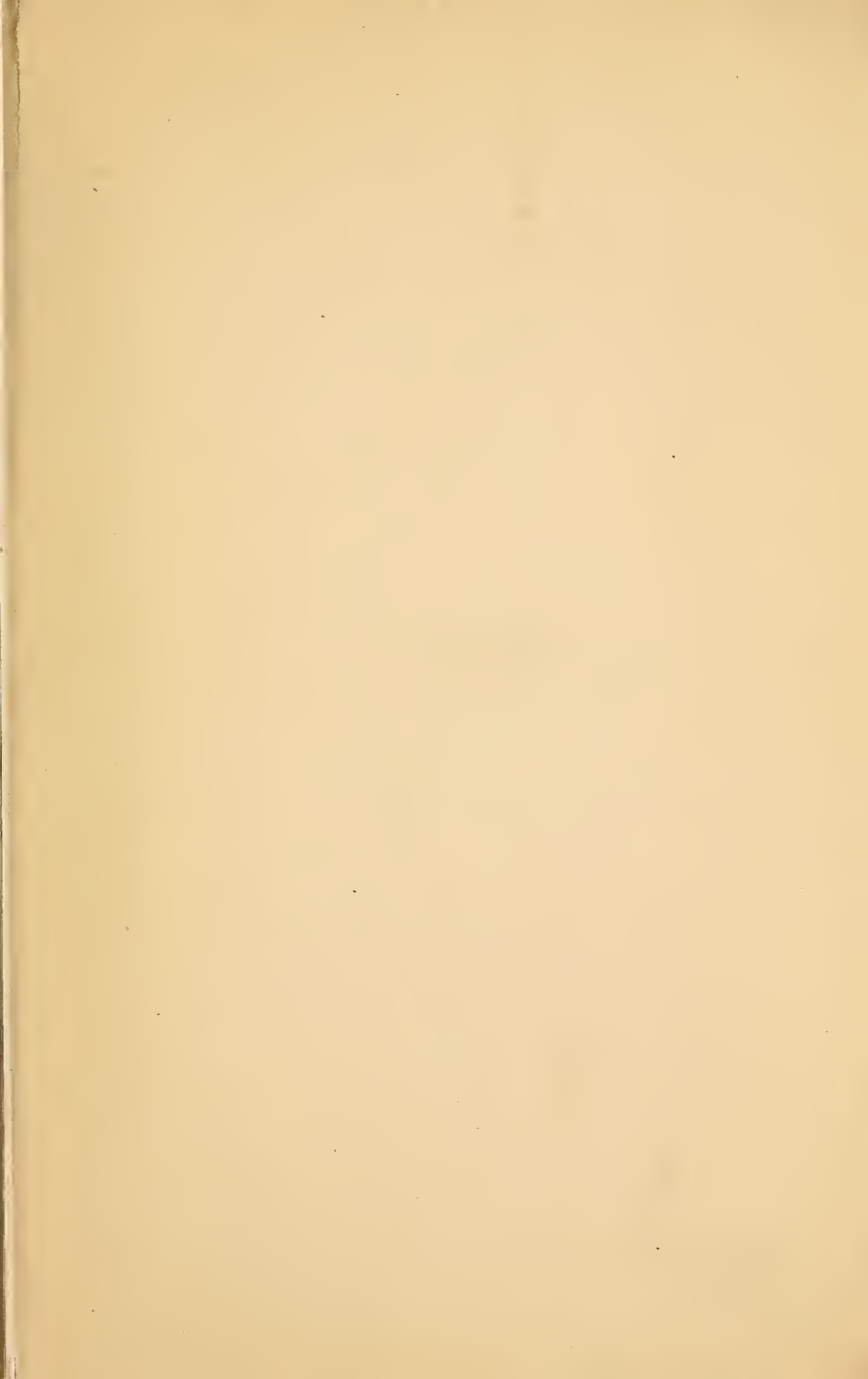
The treasure and the blood we shall have expended will not have been poured out in vain. Our country, now stooping under the chastening rod, but dearer in her afflictions, will rise from her humiliation renewed and reassured in strength, and radiant with beauty, to resume her proud place among the nations, and blend the triumphs of her future with the glories of her past history.











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